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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-395

JOHN NUVEEN & Co., INC., a Corporation, WILLIAM FEIGELSON, STUART F. SILLOWAY, FRANK P. WENDT, RICHARD J. FRANKE, WALLACE D. FISK, KENNETH R. WAHLBERG, HORACE C. WHITEMAN, INVESTORS SYNDICATE OF AMERICA, INC., a Corporation, INVESTORS DIVERSIFIED SERVICES, INC., a Corporation, and ALLEGHANY CORPORATION, a Corporation,

Petitioners,

v.

HENRY T. SANDERS,

Respondent.

REPLY BRIEF OF PETITIONERS

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John Nuveen & Co., Inc., a Corporation, William Feigelson, Stuart F. Silloway, Frank P. Wendt, Richard J. Franke, Wallace D. Fisk, Kenneth R. Wahlberg, Horace C. Whiteman, Investors Syndicate of America, Inc., a Corporation, Investors Diversified Services, Inc., a Corporation, and Alleghany Corporation, a Corporation,

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v.

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REPLY BRIEF OF PETITIONERS

There are only three points made in Respondent's Brief in Opposition to the Petition for Certiorari herein worthy of comment, and, on analysis, each is without merit.

I.

The fundamental issue of law involved in this matter is whether the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78a *et seq.*, applies, in any respect whatever, to a 90-day promissory note. Respondent seeks to becloud the issue, by reference to the market in which the promissory note acquired by Respondent was purchased. There is no question that Respondent purchased

the Winter & Hirsch, Inc. promissory note involved in this litigation from Petitioner John Nuveen & Co., Inc. ("Nuveen") or that Nuveen is a securities broker-dealer, registered as such under Section 15 of the 1934 Act, 15 U.S.C. § 78o. However, this in no way overcomes the fact that what Respondent purchased, and what Nuveen sold to him, was not a "security" within the meaning of Section 3(a)(10) of the 1934 Act, 15 U.S.C. § 78c(a)(10). Notwithstanding a clear Congressional determination to the contrary, Respondent's position seems to be that, since the Winter & Hirsch promissory note is a "security" as defined in other Federal securities laws and was sold to him by a securities broker-dealer, the note must be a "security" for purposes of the antifraud provisions of Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). To so conclude, requires a substantial rewriting of Section 3(a)(10) of the 1934 Act, and if that is to be done it is properly to be done by the Congress, not the Federal courts.

II.

Second, in arguing that the 90-day commercial paper in issue here is subject to the antifraud provisions of the 1934 Act, Respondent erroneously seeks to analogize between such commercial paper and the Treasury Bonds involved in the litigation considered by this Court in *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).* Whatever their simi-

* In doing so, Respondent studiously ignores the four opinions by courts within the Second Circuit, including the district court's decision in the *Superintendent of Insurance* case, cited by Petitioner which establish that the only appropriate inquiry in determining if a promissory note is a "security" under the 1934 Act is whether or not its maturity is longer than nine months. Applied to this case, such inquiry alone would compel reversal of the Seventh Circuit's decision.

larities, however, the fact remains that the 1934 Act, by its express terms, makes the antifraud provisions of Section 10(b) applicable to Treasury Bonds and not to 90-day commercial paper. In the first place, there can be no question that a Treasury Bond is a "security" within the definition of Section 3(a)(10) of the 1934 Act; clearly and undisputably, it is. No question was raised in the *Superintendent of Insurance* case as to whether the transaction in issue there *could be* the subject of an action under Section 10(b), only whether on the facts presented, a claim of violation had been asserted. By contrast, no claim of violation of Section 10(b) can be asserted in the instant case since that section is applicable only to transactions in "securities" as defined in the 1934 Act and the Winter & Hirsch 90-day note sold to Respondent is specifically excluded from the statutory definition of security.

Respondent gains nothing at all from the fact that Treasury Bonds, clearly "exempted securities" within the meaning of Section 3(a)(12) of the 1934 Act, 15 U.S.C. § 78c(a)(12), are nonetheless subject to the antifraud provisions of Section 10(b). That is the statutory scheme developed and adopted by Congress. "Exempted securities" are, first and foremost, "securities." That they are exempted from some substantive provisions, and not others, is the Congressional intent. As Professor Loss has noted:

> "The treatment of exemptions in the Exchange Act is quite different from that in the Securities Act . . . essentially because the Exchange Act contains so many different kinds of substantive provisions . . . . Some of the substantive provisions of the [Exchange] act specifically exclude 'exempted securities' and others do not. Examples of the former . . . are § 15(a) on broker-dealer registration and § 7 on margin requirements. Examples of the latter are §§ 10(b) and

> 15(c)(1), two of the general antifraud provisions." 2 Loss, Securities Regulation 797-798 (2d ed., 1961).

It is only after the initial hurdle is crossed, and the determination is made that a "security" is involved, that one reaches the question whether a particular kind of security is exempted from a particular substantive provision of the statute. Thus, although the Treasury Bonds involved in the *Superintendent of Insurance* case are exempt from the margin requirements of Section 7 of the 1934 Act, 15 U.S.C. § 78g, and broker-dealers who transact business exclusively therein need not register under Section 15 of the 1934 Act, Treasury Bonds are nonetheless "securities" and are, therefore, subject to Section 10(b) of the 1934 Act since "exempted securities" are not excluded from the coverage of that provision. However, since the instrument in question here is not a "security," none of the substantive provisions of the 1934 Act apply, and this Court's decision in the *Superintendent of Insurance* case provides no support for a contrary view.

III.

Finally, Respondent seeks to minimize the impact of the fact that the S.E.C. continues to read the 1934 Act's definition of security as Congress wrote it, notwithstanding the aberrant decision of the court below, by charging that:

> "The Petitioners fail to point out, however, that the *Staff Study*,[*] where it relates to short-term commercial paper, is referring specifically to that paper issued by Penn Central Transportation Company" (Respondent's Brief in Opposition, p. 11).

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[*] *S.E.C. Staff Study of the Financial Collapse of the Penn Central Company*, File No. HO-482 (August 7, 1972).

Although true, this fact is, indeed, irrelevant. The Commission's exhaustive *Staff Study* defines commercial paper, not with specific reference to any particular company, but generically as ". . . a corporate short-term promissory note . . . sold either directly by the issuer (borrower) to the purchaser (lender), or by the issuer to a dealer who resells to the purchaser." *Staff Study* at 549. Moreover, the *Staff Study's* statement that short-term commercial paper is not subject to the 1934 Act could not be more unequivocal and unqualified:

> "In addition to the exemption from registration under the Securities Act of 1933, *commercial paper maturing within 270 days also is exempt from all of the provisions of the Securities Exchange Act of 1934.*" *Staff Study* at 554 (Emphasis added; footnote omitted).

While Section 3(a)(6) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(6), contains an exemption from registration which applies not just to the Penn Central Transportation Company, but rather to "[a]ny security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20(a) of the Interstate Commerce Act, as amended," there is no counterpart general exemption anywhere in the 1934 Act. Thus, the S.E.C.'s statement that commercial paper maturing within 270 days is exempt from the 1934 Act means precisely what it says—the exemption applies to *all* short-term commercial paper, including the instrument purchased by Respondent.

For the reasons given herein and in the Petition for Certiorari, we pray that the Writ be granted.

Respectfully submitted,

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